

¹ The ALJ's order is designated as a "Preliminary Decision" when in reality it is a post-award medical order. The parties appeared at the hearing and the medical records referenced herein were admitted without objection. No depositions were taken nor were any terminal dates set as contemplated by K.S.A. 44-523.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs, the Board makes the following findings of fact and conclusions of law:

Claimant was employed by the respondent until his retirement in January of 2005. Before his retirement, he was injured in a series of microtraumas to his bilateral upper extremities beginning November 1, 2002. He was treated for bilateral carpal tunnel syndrome, bilateral ulnar nerve complaints, right lateral epicondylitis and trigger fingers. He had a number of surgeries, including surgery to address the carpal tunnel condition in his left wrist and the claim was ultimately settled in June 17, 2004 with claimant retaining his right to future medical benefits.

In February 2010, claimant sought treatment from his own physician for complaints in his left arm and wrist. Claimant describes numbness in his fingers and a heaviness in the arms. He testified that his fingers sometimes felt like big balloons, *just like before*.² These symptoms dated back almost two years before this office visit, slowly becoming progressively worse as time passed. Claimant acknowledges he suffers from type II diabetes, and that since his retirement he has moved to a farm and has, on occasion, performed some truck maintenance. He also admits doing some limited farming work two times a year, including spraying weeds in the summer and burning off the fields in the spring. When he does these things, he does what he can to avoid using his left arm as he experiences pain and cannot support much weight. When his symptoms became too noticeable to ignore, he sought out help from his family physician. According to claimant, he did not know, at least at that point that the symptoms were related to his earlier injury or condition.

Claimant's doctor referred him to Dr. Vito J. Carabetta who performed an EMG. Dr. Carabetta's report indicates that claimant's EMG results are "consistent with moderate recurrence of compression neuropathy".³ Dr. Carabetta specifically noted that he compared the test results and the EMG results reveal claimant's sensory and motor distal latencies have increased in the left median and ulnar nerves since 2003. Dr. Carabetta's bill remains unpaid.

Respondent referred claimant to Dr. Michael M. Hall who examined claimant on November 4, 2010 and issued a report which, in sum, indicates claimant's present complaints are unrelated to his past work activities. He states:

² P.A.H. Trans. at 8.

³ *Id.*, Ex. 1 at 4 (Dr. Carabetta's Apr. 23, 2010 report).

We need to look at the whole picture. Mr. Williamson has not worked in over six years for the city. He lives on a farm which he tends to. He still does work on his cars. He says he admits to possibly sustaining trauma to his elbow by his dog. He is obese, and he has diabetes a proven cause for carpal tunnel. He says he has a positive Tinel in the cubital tunnel but his nerve was reportedly moved out of that tunnel.

Just because he has had carpal tunnel as well as cubital tunnel releases years ago, does not mean that he is any more prone to having it again. I believe it makes him less prone. Reoccurrence is rare and if it does occur usually a systemic problem like diabetes is too [sic] blame. He has multiple reasons to have it recur and these risk factors have nothing to do with his previous job.⁴ (Emphasis in original)

After hearing claimant's testimony and considering the physicians' reports, the ALJ granted claimant's request for post-award medical treatment. She specifically found that "claimant has met his burden of proof that his current need for medical treatment is due to the compensable workers compensation claim".⁵ She went on to appoint Dr. Gonzalez as the treating physician.⁶ She also ordered respondent to pay Dr. Carabetta's bill in connection with the EMG.

In a request for post-award medical treatment, the claimant has the burden to prove his right to an award of compensation and prove the various conditions on which his right depends.⁷ In a post-award medical proceeding, an award for additional medical treatment can be made if the trier of fact finds that the need for medical care is necessary to relieve and cure the natural and probable consequences of the original accidental injury which was the subject of the underlying award.⁸

As noted, the claimant has the burden of proof to establish that his need for post-award medical treatment is causally related to the injury suffered in the underlying accident. That burden remains the same even if claimant has suffered intervening accidents. It is simply a matter of proof. And although the passage of time and intervening accidents may increase the claimant's difficulty in establishing the causal connection, nonetheless, there are no prohibitions against claimant attempting to prove the current need for medical treatment is related to the previous compensable work-related injury.

⁴ *Id.*, Ex. 1 at 8 (Dr. Hall's Nov. 4, 2010 report at 3).

⁵ ALJ Preliminary Decision (Apr. 15, 2011) at 1.

⁶ Dr. Gonzalez was the treating physician for claimant's workers compensation claim.

⁷ K.S.A. 44-501(a).

⁸ K.S.A. 44-510k(a).

The Board has considered the evidence and a majority of the Board concludes the ALJ's Order should be reversed. Dr. Hall has expressed the opinion that claimant's present complaints are attributable to a whole host of other possible causes, but most certainly not work related. Rather, they are more likely due to other causes, such as claimant's diabetes. In essence, Dr. Hall opined that claimant's present complaints were due to anything but claimant's prior work-related injury, due largely to the fact that claimant has not worked for respondent for a number of years.

Admittedly, Dr. Carabetta's report suggests that claimant has had a "recurrence" of the carpal tunnel injuries or condition for which he was originally treated, and his EMG results show the nerve damage has increased. But his report does not indicate whether he believes this recurrence is the natural and probable result of the original injury or due to a subsequent injury or injuries. Absent such evidence, a majority of the Board concludes that Dr. Hall's specific opinions as to causation are uncontroverted.

For these reasons, the Board finds the ALJ's conclusion as to causative aspects of claimant's present need for treatment should be reversed. Likewise, her decision to order respondent to pay Dr. Carabetta's bill and to designate Dr. Gonzalez as the treating physician is reversed as well.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Preliminary Decision of Administrative Law Judge Marcia Yates Roberts dated April 15, 2011, is reversed and set aside.

IT IS SO ORDERED.

Dated this _____ day of June 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned Board Members respectfully dissent from the majority's decision to reverse the ALJ's decision to grant post-award medical treatment. Although respondent portrays Dr. Hall's opinions as uncontroverted, in reality Dr. Hall's views as to the underlying facts giving rise to claimant's present complaints are controverted by claimant's own testimony. Thus, Dr. Hall's ultimate conclusions are not necessarily unchallenged. For example, Dr. Hall suggested that claimant's left upper extremity problems were the result of his dog kicking him. As claimant testified, claimant denies that any such event happened. He merely offered that as a possible explanation for his problems but specifically told Dr. Hall that he did not recall any such event. Similarly, claimant acknowledges repairing a vehicle's U joint but explained that that event took little time. And as for the farm work, claimant performs very limited activities and works with help and at his own pace, burning off the field and spraying weeds, each only one time a year. Dr. Hall also indicates that a post-surgical carpal tunnel patient is *less prone* to having a recurrence of such symptoms. He does not say that such a recurrence is impossible.

What is uncontroverted is the fact that claimant is having the very same symptoms he had while working for respondent. Dr. Carabetta's report indicates that claimant has had a *recurrence*. The import of that word is inescapable. Claimant has experienced a recurrence of the symptoms for which he was originally treated during the course of his work-related claim. These members find that there is nothing ambiguous in his terminology and would affirm the ALJ's preliminary decision in its entirety.

BOARD MEMBER

BOARD MEMBER

c: Timothy M. Alvarez, Attorney for Claimant
Frederick J. Greenbaum, Attorney for Self-Insured Respondent
Marcia Yates Roberts, Administrative Law Judge